

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

DAVID A. HAIRSTON, JR.,)	CASE NO. 4:11CV00014
)	
Plaintiff,)	
v.)	<u>REPORT AND RECOMMENDATION</u>
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social Security,)	
)	
Defendant.)	By: B. Waugh Crigler
)	U. S. Magistrate Judge

This challenge to a final decision of the Commissioner which denied plaintiff's August 22, 2007 applications for a period of disability, disability insurance benefits, and supplemental security income ("SSI") under the Social Security Act ("Act"), as amended, 42 U.S.C. §§ 416, 423 and 1381 et seq., is before this court under authority of 28 U.S.C. § 636(b)(1)(B) to render to the presiding District Judge a report setting forth appropriate findings, conclusions and recommendations for the disposition of the case. The questions presented are whether the Commissioner's final decision is supported by substantial evidence, or whether there is good cause to remand for further proceedings. 42 U.S.C. § 405(g). For the reasons that follow, the undersigned will RECOMMEND that an Order enter GRANTING the Commissioner's motion for summary judgment, AFFIRMING the Commissioner's final decision and DISMISSING this action from the docket of the court.

In a decision issued on November 25, 2009, an Administrative Law Judge ("Law Judge") found that plaintiff had not engaged in substantial gainful activity since August 7, 2007, his alleged disability onset date, and that he remained insured through June 30, 2010. (R. 17.)

The Law Judge determined plaintiff's arthritis and degenerative disc disease were severe impairments. (*Id.*) Even so, the Law Judge found that that he did not suffer an impairment or combination of impairments which met or equaled a listed impairment. (*Id.*) The Law Judge further found that plaintiff retained the residual functional capacity ("RFC") to perform a range of light work. (R. 18.) Specifically, he could lift and/or carry twenty pounds occasionally and ten pounds frequently, and could stand and/or walk for four to six hours in an eight-hour workday. (*Id.*) He should never climb ropes or scaffold, but he could occasionally climb stairs, balance, stoop, kneel, crouch and crawl, and he has no significant manipulative, visual, communicative, or environmental limitations. (*Id.*) The Law Judge concluded that plaintiff could not return to his past relevant work as a truck driver, but that jobs existed in substantial numbers in the national economy that he could perform. (R. 22.) Thus, the Law Judge ultimately found that plaintiff was not disabled. (R. 23.)

Plaintiff appealed the Law Judge's November 25, 2009 decision to the Appeals Council. (R. 1-3.) The Appeals Council found no basis in the record or in the reasons advanced on appeal to review the decision, denied review, and adopted the Law Judge's decision as the final decision of the Commissioner. (R. 1.) This action ensued.

The Commissioner is charged with evaluating the medical evidence and assessing symptoms, signs and medical findings to determine the functional capacity of the claimant. *Hays v. Sullivan*, 907 F.2d 1453 (4th Cir. 1990); *Shively v. Heckler*, 739 F.2d 987 (4th Cir. 1984). The regulations grant some latitude to the Commissioner in resolving conflicts or inconsistencies in the evidence which the court is to review for clear error or lack of substantial evidentiary support. *Craig v. Chater*, 76 F.3d 585 (4th Cir. 1996). In all, if the Commissioner's resolution of

the conflicts in the evidence is supported by substantial evidence, the court is to affirm the Commissioner's final decision. *Laws v. Celebrezze*, 368 F.2d 640 (4th Cir. 1966).

In his *pro se* letter brief, plaintiff initially argues that the Law Judge's credibility finding is not supported by substantial evidence. (Pl's Brief, p. 1.) Specifically, plaintiff contends that the objective medical evidence reveals that he has a medical condition which could reasonably be expected to cause the degree of pain he has alleged, and that his testimony, if properly credited, mandated a finding that he is disabled. (*Id.*)

There is a two-step process for evaluating subjective complaints. *Craig v. Chater*, 76 F.3d 585 (4th Cir. 1996). The two-step process corresponds with Social Security Ruling ("SSR")¹ 96-7p and the regulations at 20 C.F.R. §§ 404.1529, 416.929. At step one, the Law Judge must determine whether there is objective medical evidence showing the existence of a medical impairment that reasonably could be expected to produce the pain or symptoms alleged. *Craig*, 76 F.3d at 594. At step two, the Law Judge must evaluate the intensity and persistence of the claimant's pain or other symptoms alleged based on all the evidence in the record, including the claimant's testimony. *Id.* at 595. Step two of the credibility analysis involves consideration of the claimant's statements of pain and other alleged symptoms, as well as factors such as: (1) the claimant's daily activities; (2) the location, duration, frequency, and intensity of the pain or other symptoms; (3) precipitating or aggravating factors; (4) the type, dosage, effectiveness, and side effects of medication; (5) treatments, other than medication, received for relief of

¹ Social Security Rulings are the Social Security Administration's interpretations of the Social Security Act. *Pass v. Chater*, 65 F.3d 1200, 1204 n. 3 (4th Cir. 1995). "[T]hey are entitled to deference unless they are clearly erroneous or inconsistent with the law." *Id.* (citing *Quang Van Han v. Bowen*, 882 F.2d 1453, 1457 (9th Cir. 1989)).

symptoms; (6) measures used to relieve symptoms; and (7) other factors concerning functional limitations and restrictions caused by symptoms. 20 C.F.R. §§ 404.1529(c)(3), 416.929(c)(3).

At step one in his credibility assessment, the Law Judge found that that plaintiff's medically determinable impairments reasonably could be expected to cause the alleged symptoms. (R. 19.) At step two, the Law Judge found that plaintiff's statements concerning the intensity, persistence and limiting effects of these symptoms were "not credible," to the extent they were inconsistent with the Law Judge's finding that plaintiff could perform a range of light work. (*Id.*) For the reasons that follow, the undersigned finds that the Law Judge's credibility finding is supported by substantial evidence.

The Law Judge noted that the record revealed evidence of self-limiting behavior, a conclusion well-supported by the medical record. (R. 22.) For example, Joel M. Singer, M.D. conducted an independent medical evaluation and found that plaintiff was malingering.² (R. 338.) Physical Therapist James Turner's physical work performance evaluation revealed that plaintiff exhibited self-limiting behavior³ on 22% of the 18 tasks he was asked to perform. (R. 323.) Tuan Huynh, M.D.'s consultative examination and revealed that plaintiff "seems to be inconsistent with his pain pattern. He does not give a good effort during the examination." (R. 388.)

The opinions rendered by the State agency record reviewing physicians provide additional evidentiary support for the Law Judge's credibility finding. Robert Chaplin, M.D.

² Dr. Singer's actual report is not in the record. Even so, treating source Robert E. Cassidy, M.D. summarizes the report in his treatment note dated January 4, 2006. (R. 338-339.)

³ Turner's report provides that self-limiting behavior means that the patient stopped a given task before a maximum effort was achieved. (R. 323.)

concluded that plaintiff's statements were only "partially credible." (R. 318.) Another State agency record reviewing physician, Catherine Howard, M.D., concurred. (R. 399.)

Next, plaintiff argues that the Law Judge erred by failing to include manipulative limitations in his RFC assessment. (Pl's Brief, p. 1.) RFC is defined as that which an individual remains able to do despite the limitations caused by the claimant's impairments. 20 C.F.R. § 404.1545(a). The determination of a claimant's RFC is an administrative finding, and the final responsibility for determining RFC is specifically reserved to the Commissioner. *England v. Astrue*, 2011 WL 5592849, *2 (W.D.Va. November 16, 2011).

"Fingering involves picking, pinching, or otherwise working primarily with the fingers." SSR 85-15, 1985 WL 56857, at *7 (internal quotation marks omitted). "Handling" is defined as "seizing, holding, grasping, turning or otherwise working primarily with the whole hand or hands." *Id*; see also SSR 83-14, 1983 WL 31254, at *2 (grasping, holding, and turning are required "at all exertional levels"). "Significant limitations of . . . handling, therefore, may eliminate a large number of occupations a person could otherwise do." SSR 85-15, 1985 WL 56857, at *7.

A consultative examination performed on October 26, 2007 supports the Law Judge's finding that plaintiff did not suffer manipulative limitations. (R. 385-390.) Dr. Huynh found that plaintiff was able to dress himself, feed himself, tie his shoes, button his clothes, write, turn a doorknob, pick up coins, pins and keys, and open a jar by himself. (R. 386.)

Evidence from the State agency record reviewing physicians also supports the Law Judge's finding that plaintiff did not suffer manipulative limitations. Dr. Chaplin found that

plaintiff suffered no manipulative limitations (R. 315.), and Dr. Howard concurred with this finding (R. 394).

Finally, plaintiff contends that the Law Judge failed to properly evaluate the opinions offered by treating source Ashish C. Shah, M.D. (Pl's Brief, p. 2.) The undersigned disagrees, and finds that the Law Judge's decision to accord less than controlling weight to Dr. Shah is supported by substantial evidence.

Under the regulations and applicable circuit decisional authority, a Law Judge and the Commissioner must consider the following in evaluating and weighing medical opinions: “(1) whether the physician has examined the applicant, (2) the treatment relationship between the physician and the applicant, (3) the supportability of the physician's opinion, (4) the consistency of the opinion with the record, and (5) whether the physician is a specialist.” *Hines v. Barnhart*, 453 F.3d 559, 563 (4th Cir. 2006) (quoting *Johnson v Barnhart*, 434 F.3d 650, 654 (4th Cir. 2005)).

It is a well-established general principle that the evidence of a treating doctor should be accorded greater weight. *Hunter v. Sullivan*, 993 F.2d 31, 35 (4th Cir. 1992). Yet, when that physician's opinion is not supported by the objective medical evidence or is inconsistent with other substantial evidence, it may be given “significantly less weight.” *Craig*, 76 F.3d at 590. Moreover, where the evidence is such that reasonable minds could differ as to whether the claimant is disabled, the decision falls to the Law Judge, and ultimately to the Commissioner, to resolve the inconsistencies in the evidence. *Johnson*, 434 F.3d at 653; *Craig*, 76 F.3d at 589.

Dr. Shah, a specialist in internal medicine, treated plaintiff for the first time on August 21, 2007. (R. 369-370.) On July 29, 2009, Dr. Shah completed a “medical statement” for

plaintiff in which he noted that plaintiff suffered the following: a history of joint pain, swelling and tenderness; morning stiffness; synovial inflammation; limitation of motion in joints; and an inability to ambulate effectively. (R. 441.) The physician noted that plaintiff suffered significant fatigue and malaise. (R. 442.) In assessing his functional capacity, Dr. Shah opined that plaintiff could sit at one time or stand at one time for only thirty minutes. (*Id.*) The physician found that plaintiff could never engage in fine manipulation with the left hand or right hand and could only occasionally engage in gross manipulation with either hand. (*Id.*) Dr. Shah further found that plaintiff could only occasionally raise his right or left arm over shoulder level. (*Id.*) Most significantly, the physician opined that plaintiff was unable to work. (*Id.*)

The Law Judge determined that Dr. Shah's opinion was entitled to "little weight" for several reasons. Initially, the Law Judge noted that other than a treatment note from August 21, 2007, there was no evidence that plaintiff had received any treatment from Dr. Shah. (R. 21.) The Law Judge also found that Dr. Shah's treatment notes did not reflect that plaintiff suffered limitations as severe as those contained in the July 29, 2009 assessment. (*Id.*) Finally, the Law Judge concluded that Dr. Shah's opinion was not consistent with the medical evidence of record and other medical opinions contained in the record. (*Id.*)

The opinions offered by the State agency record reviewing physicians are also contrary to Dr. Shah's opinion that plaintiff suffered work-preclusive limitations. Dr. Chaplin evaluated plaintiff's medical records in September 2005. (R. 313-318.) He noted that plaintiff's primary diagnosis was a mild disk bulge at C6-C7. (R. 313.) The physician found that plaintiff could occasionally lift and/or carry (including upward pulling) twenty pounds and could frequently lift/carry ten pounds. (R. 314.) The physician further found that plaintiff could stand and/or

walk (with normal breaks) for a total of about six hours in an eight-hour workday and could sit (with normal breaks) for about six hours in an eight-hour workday. (*Id.*) Dr. Chaplin determined that plaintiff's ability to push and/or pull (including operation of hand/food controls) was unlimited, other than his limitations on the ability to lift and/or carry. (*Id.*) Dr. Howard conducted an independent review of plaintiff's medical records on November 1, 2007. (R. 392-399.) She too opined that plaintiff could perform a range of light work.

For all these reasons, it is RECOMMENDED that an Order enter GRANTING the Commissioner's motion for summary judgment, AFFIRMING the Commissioner's final decision and DISMISSING this case from the docket of the court.

The Clerk is directed to immediately transmit the record in this case to the presiding United States District Judge. Both sides are reminded that pursuant to Rule 72(b) they are entitled to note objections, if any they may have, to this Report and Recommendation within fourteen (14) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned not specifically objected to within the period prescribed by law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C. § 636(b)(1)(C) as to factual recitations or findings as well as to the conclusions reached by the undersigned may be construed by any reviewing court as a waiver of such objection. The Clerk is directed to transmit a certified copy of this Report and Recommendation to all counsel of record.

ENTERED: _____
U.S. Magistrate Judge

Date